A **IJM CORPORATION BERHAD**

v.

ZAMRI HJ IBRAHIM & ANOR

B COURT OF APPEAL, PUTRAJAYA
CLEMENT SKINNER JCA
ALIZATUL KHAIR OSMAN JCA
ROHANA YUSUF JCA
[CIVIL APPEAL NO: P-02-1635-2011]
C 11 OCTOBER 2013

CONTRACT: *Sale and purchase of property - Vacant possession - Delivery of - Notice of vacant possession - Whether notice given to purchasers - Purchasers denied receipt of notice - Whether failure to call* D *maker of notice rendered notice inadmissible - Whether notice formed part of company's record - Whether subsequent conduct proved purchasers aware of delivery of vacant possession*

EVIDENCE: *Documentary evidence - Admissibility of - Notice of* E *delivery of vacant possession - Purchasers denied receipt of notice - Whether failure to call maker of notice rendered notice inadmissible - Whether notice formed part of company's record - Whether made in ordinary course of business - Whether document relevant - Whether document admissible - Evidence Act 1950 ss. 32, 73A*

F The appellant was the developer of a project known as Wisma Pantai while the respondents were advocates and solicitors. By a sale and purchase agreement ('the agreement'), they bought an almost completed office unit ('the unit') in the said project for a purchase price of RM324,700 ('the purchase price') and the G respondents paid the deposit of 10% of the purchase price. The appellant then sent a notice to the respondents notifying them that the unit had been completed and that the respondents were requested to settle all outstanding payments and outgoings, failing which, the respondents were deemed to have taken vacant H possession upon expiry of 14 days from the date of the said letter, which was 9 October 1996. The appellant sent notice of payment progress directly to the respondents' financier ('EON Finance'), claiming for payment of RM292,000 ('the balance purchase price') which the respondents obligingly did. However, vacant possession I was not delivered to the respondents as it was alleged by the appellant that the former did not pay the service, insurance, quit rent and assessment charges ('the charges') in the sum of

RM105,501.13. The appellant proceeded to file a claim for the charges at the High Court while the respondents counterclaimed for liquidated and ascertained damages. The High Court Judge did not admit the notice dated 9 October 1996 ('ID2') because its signatory ('Mr Goh') was not called as a witness. The judge also found that there was no proof of posting of ID2. For these reasons, the judge dismissed the appellant's claim and allowed the respondents' counterclaim. Hence, the present appeal which posed the questions of (i) whether vacant possession of the unit had been delivered; and (ii) whether there was misdirection by the High Court Judge in rejecting ID2 in light of ss. 32 and 73A of the Evidence Act 1950 ('the Act').

Held (allowing appeal)
Per Rohana Yusuf JCA delivering the judgment of the court:

(1) Even though the maker of ID2 was not called to testify, following s. 73A(2)(a) of the Act, the court may, if having regard to all the circumstances of the case, is satisfied that undue delay or expense would otherwise be caused, admit a document even if the maker is available but not called. Mr Goh had left the company and his portfolio was taken over by SP1, the Senior Manager of the company. It would naturally follow that SP1 was charged with custody and control of the company records. SP1 gave testimony based on the appellant company's record and the record showed that ID2 was issued and served on the respondents. (paras 10 & 13)

(2) In light of s. 73A of the Act, the judge had misdirected himself in not admitting the document since it formed part of the record of the company considering that the whereabouts of Mr Goh could not be ascertained by the appellant. SP1 had testified that ID2 was sent to the respondents but he could not locate the proof posting because his staff did not realise the significance of this proof till they encountered this case. (para 14)

(3) The presumption of service of ID2 could be based upon the subsequent conduct of the respondents. The subsequent conduct of the respondents was relevant which would go to prove that the respondents were all the time aware of the notice in ID2. According to SP1, none of the other purchasers had complained about not receiving the notice for

delivery of vacant possession of their respective units. The other purchasers had been either in possession of the respective units or had rented them out. (paras 15 & 16)

(4) It was not disputed that EON Finance had paid the balance purchase price in full through their solicitors. This could not have happened without the knowledge and the instruction of the respondents. The respondents would have known of this fact since they would have had to pay the monthly instalments for the loan in full and not for the sums so released progressively. Under the second schedule of the agreement, the balance of the purchase price would have to be settled only upon the delivery of vacant possession of unit. It was inconceivable that the respondents would authorise their financier to pay if they were not aware that the units was already completed and vacant possession had been delivered. (para 17)

Bahasa Malaysia *Translation Of Headnotes*

Perayu merupakan pemaju sebuah projek yang dikenali sebagai Wisma Pantai manakala responden-responden adalah peguambela dan peguamcara. Melalui perjanjian jual beli ('perjanjian'), mereka membeli unit pejabat yang hampir siap ('unit') dalam projek tersebut dengan harga belian sebanyak RM324,700 ('harga belian') dan responden-responden membayar deposit 10% daripada harga belian. Perayu kemudiannya menghantar notis kepada responden-responden memaklumkan mereka bahawa unit tersebut telah disiapkan dan bahawa responden-responden diminta menyelesaikan kesemua bayaran yang tertunggak, yang mana jika gagal, responden-responden dikatakan telah mengambil milikan kosong apabila luput 14 hari dari tarikh notis tersebut, iaitu pada 9 Oktober 1996. Perayu kemudiannya menghantar notis bayaran kemajuan secara langsung kepada pembiaya responden-responden ('EON Finance'), menuntut bayaran RM292,000 ('baki harga belian') yang dilunaskan oleh responden-responden. Walau bagaimanapun, milikan kosong tidak diserahkan kepada responden-responden kerana perayu mendakwa bahawa responden-responden tidak membayar caj perkhidmatan, insurans, cukai tanah dan taksiran ('caj-caj') berjumlah RM105,501.13. Perayu terus memfailkan tuntutan bagi caj-caj tersebut di Mahkamah Tinggi manakala responden-responden menuntut balas bagi ganti rugi yang telah ditetapkan. Hakim Mahkamah Tinggi tidak menerima

masuk notis bertarikh 9 Oktober 1996 ('ID2') kerana penandatangannya ('En Goh') tidak dipanggil sebagai seorang saksi. Hakim juga mendapati bahawa tiada bukti pengeposan ID2. Bagi alasan-alasan ini, hakim menolak tuntutan perayu dan membenarkan tuntutan balas responden-responden. Oleh itu, rayuan ini, yang menimbulkan soalan-soalan (i) sama ada milikan kosong unit telah diserahkan; dan (ii) sama ada terdapat salah arah oleh Hakim Mahkamah Tinggi dalam menolak ID2 melihatkan pada ss. 32 dan 73A Akta Keterangan 1950 ('Akta').

Diputuskan (membenarkan rayuan)
Oleh Rohana Yusuf HMR menyampaikan penghakiman mahkamah:

(1) Walaupun pembuat ID2 tidak dipanggil untuk memberi keterangan, di bawah s. 73A Akta, mahkamah boleh, jika setelah mempertimbangkan hal-hal keadaan kes, berpuas hati bahawa kelewatan atau perbelanjaan tidak wajar akan berlaku, menerima masuk sesuatu dokumen walaupun pembuatnya ada tetapi tidak dipanggil. Encik Goh telah meninggalkan syarikat dan portfolionya diambil alih oleh SP1, Pengurus Kanan syarikat tersebut. Secara semulajadinya, SP1 diberikan jagaan dan kawalan rekod-rekod syarikat. SP1 memberikan keterangan berdasarkan rekod syarikat perayu dan rekod menunjukkan bahawa ID2 telah dikeluarkan dan diserahkan kepada responden-responden.

(2) Berdasarkan s. 73A Akta, hakim telah tersalah arah dengan tidak menerima dokumen tersebut kerana ia membentuk sebahagian daripada rekod syarikat memandangkan bahawa lokasi Encik Goh tidak dapat dikenal pasti oleh perayu. SP1 telah memberi keterangan bahawa ID2 telah dihantar kepada responden-responden tetapi tidak dapat mencari bukti pengeposan kerana kakitangannya tidak sedar akan kepentingan bukti tersebut hinggalah mereka berhadapan dengan kes ini.

(3) Anggapan serahan ID2 boleh dibuat berdasarkan tindakan terkemudian responden-responden. Tindakan terkemudian responden-responden adalah relevan yang mana akan membuktikan bahawa responden-responden, pada setiap masa, sedar akan notis dalam ID2. Menurut SP1, lain-lain pembeli tidak mengadu mengenai tidak menerima notis serahan milikan kosong bagi unit masing-masing. Pembeli-pembeli lain sama ada telah memiliki unit masing-masing atau telah menyewakannya.

(4) Adalah tidak disangkal bahawa EON Finance telah membayar baki harga belian secara penuh melalui peguamcara mereka. Ini tidak boleh berlaku tanpa pengetahuan dan arahan responden-responden. Responden-responden mengetahui fakta ini kerana mereka perlu membayar ansuran bulanan bagi pinjaman tersebut secara penuh dan bukan bagi jumlah yang dilepaskan secara berperingkat. Di bawah jadual kedua perjanjian, baki harga belian perlu diselesaikan hanya apabila serahan milikan kosong unit telah dilakukan. Tidak boleh dijangkakan bahawa responden-responden akan membenarkan pembiaya mereka membayar sekiranya mereka tidak sedar bahawa unit-unit tersebut telah disiapkan dan milikan kosong telah diserahkan.

Case(s) referred to:

Allied Bank (Malaysia) Sdn Bhd v. Yau Jiok Hua [2006] 3 CLJ 27 CA ***(refd)***

Kubota Agricultural Machinery Sdn Bhd v. Sharizan Sdn Bhd & Anor; Sharizan Sdn Bhd & Ors (Third Parties) [2001] 6 CLJ 104 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 69(4)

Evidence Act 1950, ss. 32(1)(b), 73A(1), (2)(a)

For the appellant - JJ Chan; M/s Shearn Delamore & Co
For the respondent - Mohd Hanif; M/s Zamri Ibrahim & Co

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-223-2009]

Reported by Najib Tamby

JUDGMENT

Rohana Yusuf JCA:

[1] This is an appeal against the decision of the High Court at Pulau Pinang, which came before us on 14 May 2013. The learned High Court Judge dismissed the claim of the plaintiff/appellant and allowed the counterclaim by the defendants/respondents. We have allowed the appeal of the appellant and we now give our reasons for our decision.

Brief Facts

[2] The appellant was the developer of a development project known as Wisma Pantai at Jalan Wisma Pantai, Kampung Gajah, 12200 Butterworth. The respondents are advocates and solicitors.

By a sale and purchase agreement dated 6 May 1996, ("the agreement") they bought an almost completed office unit known as Unit 8-5 in a building ("the unit") in the said project for a purchase price of RM324,700. The respondents paid a deposit equivalent to ten per centum of the purchase price in the sum of RM32,470.

[3] On 9 October 1996, the appellant purportedly sent a notice to the respondents informing them that the unit was completed and that the appellant was ready to deliver vacant possession. In that letter the respondents were requested to settle all outstanding payments and outgoings, failing which, the respondents were deemed to have taken vacant possession of the unit upon the expiry of 14 days from the date of the said letter. Certificate of fitness in respect of the building was issued by Majlis Perbandaran Seberang Perai ("MPSP") on 26 November 1996.

[4] On 27 August 1997, the appellant sent notice of progress payment directly to the respondents' financier EON Finance Bhd, claiming for payment of the balance of the purchase price of RM292,000. The respondents through their solicitors Messrs Azham Halim & Nor Asiah's letter dated 17 September 1997 paid the appellant the full balance of the purchase price to complete the sale.

[5] The respondents did not pay the service charges, insurance charges, quit rent and assessment (the charges) in the sum of RM105,501.13 for the reason that vacant possession had not been delivered by the appellant. Despite repeated requests made by the appellant it remained unpaid. Hence the filing of this suit by the appellant.

[6] The learned judge dismissed the appellant's claim for the charges because he found that there was no delivery of vacant possession of the unit to the respondents. He allowed the counter-claim of the respondents for liquidated and ascertained damages for the same reason, that is, that there was no delivery of vacant possession. The amount of the liquidated damages allowed pursuant to cl. 7.04 of the agreement for late delivery of vacant possession of the unit is the sum of RM467,568 for the period between 1997 to 30 September 2001 together with interest and costs.

[7] The main issue before this court is whether vacant possession of the unit had been delivered. This issue raises the question whether the notice of vacant possession dated 9 October 1996 (ID2) is admissible in evidence to prove that vacant possession had in fact been delivered to the respondents. This appeal will therefore turn upon our determination on whether the learned judge had correctly appraised the law and the facts before him when he refused to admit in evidence the notice of vacant possession dated 9 October 1996 in ID2. This had accordingly resulted in his finding that there was no delivery of vacant possession of the unit by the appellant to the respondents.

[8] Under the terms of the agreement any notice to be given, including notice for delivery of vacant possession must be in writing (see cl. 9.19 of the agreement) and must either be sent by hand or by prepaid registered post to the last known address of the purchaser. Once the notice is given and upon expiry of 14 days the purchaser is deemed to have taken vacant possession under cl. 7.05. It is the appellant's case that having served the respondent with the notice to deliver vacant possession dated 9 October 1996 and after the expiry of 14 days, vacant possession of the unit is deemed to have been delivered to the respondents.

[9] The notice of 9 October 1996 was not admitted by the learned trial judge and was marked as ID2 because its signatory Mr Goh Chye Hin was not called as a witness. The learned judge also found that there was no proof of posting of ID2 shown by the appellant. It was held by the learned trial judge that the appellant cannot rely upon the various conduct of the respondents indicating that they were very much aware of ID2 to prove that the notice was received and the unit was therefore deemed delivered. For these reasons he held that the respondents cannot be presumed to have taken delivery of the unit. In the circumstances he found that the appellant had not delivered vacant possession of the unit to the respondents.

[10] In considering the status of ID2 we note that Mr Goh Chye Hin had left the company and his portfolio was taken over by Mr Khoo Kah Hock (SP1). SP1 was then the senior manager of the appellant company. He testified relying on the appellant company's record. From the company's record he said ID2 was

issued and was served on the respondents. He could not produce proof of posting but he maintained that the notice in ID2 was indeed sent to the respondents. He confirmed so by checking it based on the system he had in his office.

[11] Learned counsel for the appellant contended that there was misdirection by the learned judge in rejecting ID2 in the light of s. 73A and s. 32 of the Evidence Act 1950. The appellant contended that the conduct of the respondents clearly show that the respondents were aware that vacant possession had been delivered, which would have supported the appellant's case that ID2 had in fact been sent to the respondents. He contended the failure of the learned judge to give weight to the conduct of the respondents is also another misdirection.

[12] We find merits in the submission of the appellant. Under s. 73A of the Evidence Act 1950 (the Evidence Act) there are three circumstances under which a statement made in a document is admissible. They are:

(i) where the maker is called to testify;

(ii) where the maker is not available, the proviso to sub-s. (1) is satisfied;

(iii) Where the maker is available but not called as witness, under the circumstances found in sub-s. (2).

[13] In the present appeal the maker of ID2 was not called to testify. Following s. 73A(2)(a) of the Evidence Act the court may, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, admit a document even if the maker is available but not called. The evidence of the existence of ID2 and its service was testified to by SP1 who had relied on his company's records. SP1 testified that he was the person who took over from Mr Goh Chye Hin and was in charge of the matter. It would naturally follow that he was charged with custody and control of the records of the company. These records, as they had been shown, include ID2 to which SP1 had access. This court in *Allied Bank (Malaysia) Sdn Bhd v. Yau Jiok Hua* [2006] 3 CLJ 27, held that a notice of demand issued by the bank's solicitor was admissible under s. 73A even though the maker was not called to testify. The signatory to the notice of demand in the above case had left the firm and migrated to Australia. In the circumstances the Court of Appeal

held that the trial judge would have discretion to admit such evidence in that case because the document was produced from the record of a law firm who had custody and control of it. In the case of *Kubota Agricultural Machinery Sdn Bhd v. Sharizan Sdn Bhd & Anor; Sharizan Sdn Bhd & Ors (Third Parties)* [2001] 6 CLJ 104 the documents which were made in the ordinary course of business used in commerce and trade were held relevant under s. 32(1)(b) of the Evidence Act and can be admitted under s. 73A because the maker cannot be produced without undue delay and expenses.

[14] SP1 in the present case confirmed that ID2 was from his company's record to which he had access and control. We are also of the opinion that ID2 being a notice to deliver vacant possession is a document made in the ordinary course of business and is therefore relevant under s. 32(1)(b). In the light of s. 73A in our view the learned judge had misdirected himself in not admitting the document since it formed part of the record of the company considering that the whereabouts of Mr Goh Chye Hin cannot be ascertained by the appellant. SP1 testified that ID2 was sent to the respondents but he could not locate the proof of posting because his staff did not realise the significance of this proof till they encountered this case.

[15] We do not agree with the learned judge that the presumption of service of ID2 cannot be based upon the subsequent conduct of the respondents. We find the subsequent conduct of the respondents relevant which would go to prove that the respondents were all the time aware of the notice in ID2.

[16] We find the following testimonies of SP1 revealing of the respondents' stand on the notice in ID2. Firstly, the building where the unit is located comprised a number of units purchased by other purchasers. According to SP1 none of the other purchasers had complained about not receiving the notice for delivery of vacant possession of their respective units. The other purchasers had been either in possession of their respective units or had rented them out.

[17] Secondly, it was not disputed that the respondents' financier EON Finance Berhad had paid the balance purchase price in full. The payment of the balance purchase price made was in the sum of RM292,000 through their solicitors, Messrs Azham Halim & Nor Asiah, by a letter dated 17 September 1997. This cannot happen without the knowledge and the instruction of the

respondents. Further, the respondents would have known of this fact since they would have had to pay the monthly instalments for the loan in full and not for the sums so released progressively. Under the second schedule of the agreement the balance of the purchase price would have to be settled only upon the delivery of vacant possession of the unit. It is inconceivable that the respondents would authorise their financier to pay if they were not aware that the unit was already completed and vacant possession had been delivered.

[18] Thirdly, about one month after paying the balance of the purchase price, the respondents *vide* their letter of 17 October 1997 appealed to the appellant for a waiver on the late payment charges imposed on them. In the said letter the respondents explained their difficulties in obtaining financing which had caused delay in their payment of the full purchase price. They said they were financially constrained because at that material time they were newly established as a firm and they needed funds for capital expenditure.

[19] In our view these are compelling reasons to show that the respondents were aware that delivery of vacant possession of the unit had taken place. The learned judge, if he had not misdirected himself, would have accepted that the notice of vacant possession had in all probability been given and that the respondents were fully aware of its existence and accordingly by virtue of cl. 7.05, vacant possession would have been deemed delivered after 14 days.

[20] We are mindful that we are not at liberty to disturb findings of facts by a trial judge unless the finding is erroneous and is contrary to the weight of evidence or where there is failure of judicial appreciation of facts or law or that the error is so manifest that it had caused injustice to the appellant, all of which warrant appellate intervention. In our view the findings of the learned judge in the present case were not specific findings of ostensible facts but facts, which could be inferred from specific facts. For that reason we are not restrained by virtue of s. 69(4) of the Courts of Judicature Act 1964 to form our own opinion on the conclusion.

[21] There is no dispute that the charges would be due but for the learned judge's finding of non-delivery of vacant position. The respondents did not dispute the amount owing as set out in the

A statement of accounts. The counterclaim of the respondents which was premised on the consequence of delay in the delivery of vacant possession should stand dismissed.

[22] Accordingly we made the following orders:

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(i) We set aside the order of the High Court and we entered judgment for the Appellant for the sum of RM105,501.13 (as at 31 December 2011) for the outstanding service charges, quit rent and assessment plus 4% interest from date of judgment at the High Court which was on 3 June 2011.

C

(ii) We ordered the respondents to refund to the appellant the sum of RM470,744 being judgment sum of RM467,568 together with interest of RM3,176 within 30 days from the date of decision.

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[23] We awarded costs at RM40,000 to the appellant here and below with deposit paid by the appellant to be refunded.

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